TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:
H.B. NO. 1832, H.D. 1, RELATING TO OUTDOOR ADVERTISING.

BEFORE THE:
SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 11, 2008 **TIME:** 9:30 AM
LOCATION: State Capitol, Room 016
Deliver to: BY FAX, Senate Sergeant-At-Arms Office, 586-6659

TESTIFIER(S): Mark J. Bennett, Attorney General
or Margaret S. Ahn, Deputy Attorney General

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General takes no position on this measure except to note the following concerns.

This bill restricts the size of signs, billboards, and outdoor advertising displayed on residential property. It further prohibits tenants and owners of residential property from receiving consideration in return for displaying signs, billboards, and outdoor advertising on their property.

Any attempt to restrict speech raises the possibility of First Amendment or Equal Protection constitutional challenges. We respectfully suggest a clarification of the prohibition on the receipt of any payment, fee, or valuable consideration in return for the display of signs, billboards, and outdoor advertising, by adding to the new section in section 2 of the bill, section 445- (b), "provided that 'valuable consideration' shall not include any benefit derived by the tenant or owner of the property from the effect of the advertising."

Also, section 445- (c) allows multi-unit residential structures with four or more units to display signs on their common areas. To avoid an Equal Protection constitutional challenge by tenants and owners of multi-unit structures with fewer than four units, we further respectfully suggest deleting the reference to "four or more units."

testimony

From: Bob Loy [bobloy@outdoorcircle.org]
Sent: Monday, March 10, 2008 9:22 AM
To: testimony
Subject: Testimony

Testimony in strong support of HB 1832 HD1
Senate Judiciary Committee
March 11, 2008
9:30 AM

Senator Brian Taniguchi, Chair
Senator Clayton Hee, Vice Chair and Members
Senate Committee on the Judiciary and Labor
State Capitol
Honolulu, HI 96813

Thank you for the opportunity to submit this testimony in strong support of HB 1832 HD1 on behalf of Na Leo Pohai, the public policy affiliate of The Outdoor Circle.

In essence HB1832 HD1 eliminates large campaign banners and sets a sensible maximum square footage for campaign signs on any one property. These minor restrictions will prevent the eyesores created in many neighborhoods—especially at strategically located properties where multiple campaign signs are plastered on fences and walls. At one intersection during the last election we observed a corner property on Oahu with more than 70 campaigns signs!

The sensible restrictions in HB1832 HD1 have been repeatedly upheld in important court cases on the mainland—including the 9th Circuit Court of Appeals. This proposed bill has the approval of the Hawaii Office of the Attorney General. The legislation passed on a nearly unanimous vote in the 2007 Hawaii House of Representatives. Now we ask you, the members of the Senate Judiciary committee, to allow the full Hawaii State Senate the opportunity to approve this measure.

House Bill 1832 HD1 strikes an appropriate balance between each citizen's right to display support for the candidates of their choice, while imposing minor restrictions that will prevent the beauty of our islands from being degraded by excessive campaign signs. This one small action can improve the ambiance of our neighborhoods and the quality of life for our residents—statewide.

Is there any doubt that the people you represent prefer to live in neighborhoods and communities that are free of the eyesore and ugliness created by excessive campaign signs? Hawai'i has a world renowned reputation for protecting its scenic beauty. We refuse to allow billboards. We insist on strict sign control laws. We have banned aerial advertising and billboard trucks. We protect and preserve our beautiful trees. This is an opportunity to continue the cherished tradition of treating our islands and our citizens with respect by providing the means to control the visual pollution created by campaign signs.

Bob Loy
Director of Environmental Programs
The Outdoor Circle
1314 South King Street, Suite 306
Honolulu, Hawaii 96814
(808) 593-0300

Senate Judiciary and Labor Committee

Tuesday, March 11, 2008
9:30 p.m.

Re HB 1832 HD 1 Relating to Outdoor Advertising

Testimony of Jon M. Van Dyke
2515 Dole Street
Honolulu, Hawaii 96822

Testifying for The Outdoor Circle

This Bill is carefully drafted to allow individuals to place signs expressing their views on their property, while at the same time regulating the size of these signs to protect the outstanding scenic beauty of our islands. It was drafted after careful study and analysis of decisions on sign regulation in Hawaii and across the nation.

The Bill allows signs to be placed on residential and agricultural property so long as they are no larger than four by two feet in dimensions, and so long as the total area of all signs on any single residential or agricultural unit does not exceed 16 square feet. The Bill prohibits any sign for which the resident or owner of the property has received any payment or other economic benefit. Residential and agricultural units are defined in terms of separate tax map keys, but each apartment or condominium unit is allowed to display signs meeting the requirements and multi-unit residential structures are allowed to display signs in their common areas so long as no single sign is larger than eight feet by four feet and that the total signage in the common areas do not exceed 64 square feet.

This Bill satisfies the test applicable to "time-place-manner" regulations, as articulated by the U.S. Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), namely that the regulation (1) must be content neutral, (2) must be narrowly tailored to meet a significant governmental interest, and (3) must leave open ample alternative channels for communication.

(1) This Bill meets the essential requirement of being "content-neutral," because it does not distinguish among the views expressed in the signs. It covers all signs, no matter what the viewpoint, the topic, or nature of the idea being expressed. It thus does not run afoul of the problems recognized by the courts in *Runyan v. McCrary*, 762 F. Supp. 280 (D.Haw. 1991) (which struck down an earlier attempt to regulate political signs because the regulation was "content-based"), and in *Ross v. Goshi*, 351 F.Supp. 949 (D.Hawaii 1972) (ruling that a Maui ordinance was unconstitutional because it made distinctions between types of signs).

(2) The Bill is narrowly tailored to meet the significant governmental interest of promoting traffic safety and protecting the outstanding visual beauty of our islands for our visitors and residents to enjoy. The legitimacy of this goal has been recognized repeatedly by the

courts, most recently in *Center for Bio-Ethical Reform v. City and County of Honolulu,* 455 F.3d 910, 922 (9th Cir. 2006), where the U.S. Court of Appeals for the Ninth Circuit explained that "[i]t is well established that regulation for purposes of preserving aesthetics and promoting safety falls within the legitimate and substantial interests of local governments" and it referred directly to the "legitimate needs" of "preserving the economically vital scenic beauty of Honolulu and minimizing traffic safety hazards for motorists and pedestrians." In ruling that Honolulu's ban on aerial advertising did not violate the Constitution, the Court added that "[a]lthough both of these goals are surely legitimate, preservation of the visual beauty of Honolulu's coastal and scenic areas is of paramount importance." *Id.*

(3) The Bill also leaves open ample alternative channels of communication, because individuals have a wide variety of other readily-available means for expressing their views, including passing out leaflets, writing letters, sending emails, holding hand-held signs in public places, buying advertising space, and making speeches in appropriate locations.

This Bill also satisfies the requirements of the U.S. Supreme Court in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (striking down a municipality's total prohibition on signs on private property), because it does permit individuals to place signs on their property to indicate to their neighbors their views on issues on candidates. The opinion in *Ladue* struck down a total ban on residential signage because such signs are "unusually cheap and convenient" and link the message directly with the speaker. *Id.* at 56. But the *Ladue* opinion also recognized the important municipal interest in preventing "visual clutter" and the "'unlimited' proliferation of residential signs." *Id.* at 58. This opinion stated clearly that governments are not "powerless to address the ills that may be associated with residential signs" and that they can enact "temperate measures" to "satisfy" their "regulatory needs." *Id.* A key footnote in this opinion explained clearly that its holding was not designed to prevent local governments from prohibiting signs posted in residential areas for a fee:

> Nor do we hold that every kind of sign must be permitted in residential areas. *Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property.* We also are not confronted here with mere regulations short of a ban.

Id. at 58 n. 17 (emphasis added). HB 1832 HD 1 has been drafted to conform to these guidelines. Hawaii has, of course, prohibited off-site outdoor advertising for almost a century.

The following cases have upheld content-neutral restrictions on signage similar to those found in this Bill:

* *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied sub nom Leipzig v. Baldwin,* 431 U.S. 913 (1977), where the Ninth Circuit upheld a municipality's restrictions on the size of signs to a maximum of 16 square feet per sign and 80 square feet for all signage on an individual parcel, explaining that "[b]oth limitations contribute to the appearance of the

community and further other legitimate municipal interests," including "the effects of the wind, upon unreinforced signs of various sizes." 540 F.2d at 1369. The Court also noted that "the burden imposed on free speech by this restriction is so minimal that generous allowance may be made for municipal preferences. *Id.*

* *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998), where the Ninth Circuit upheld an ordinance restricting picketers to carrying a single sign no larger than three square feet, explaining that "[t]he City's restrictions on the size and number of signs serve the City's interest in traffic safety, which 'would be achieved less effectively absent the regulation.'" *Id.* at 641 (*quoting from Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989)). This opinion explained that "each restriction may diminish the amount of speech that Foti and Larsen individually may make on the abortion issue," but "they do not 'reduc[e] the total quantum of speech on a public issue.'" 146 F.3d at 641 (*quoting from Meyer v. Grant*, 486 U.S. 414, 423 (1988)). The opinion also cited *Baldwin, supra*, 540 F.2d at 1369 for the proposition that the "prohibition of sign size remotely affected quantity of speech and did not significantly restrict total exposure of political candidate." 146 F.3d at 641. In explaining why the limitation on the size of the size was appropriate, the Court concluded that:

> The restrictions on the size and number of picket signs are reasonable legislative judgments in light of the City's concern for traffic safety. A fifteen square foot sign carried by a protester on a public sidewalk, when compared to a three square foot sign, may block drivers' views of road signs and traffic conditions, intimidate pedestrians, and obstruct the safe and convenient circulation of pedestrians on the sidewalk. Numerous signs propped against a bus stop or carried by one person on the sidewalk may impede pedestrian flow or create a safety hazard.

Id.

* *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1081 (9th Cir. 2006), where the Ninth Circuit spoke approvingly of a municipal regulation restricting temporary signs posted on residential property before and after elections to six square feet in size.

* *South-Suburban Housing Center v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991), which upheld municipal restrictions on the number and size of "for sale" signs that can be placed in front of houses, restrictions that were designed "to advance the aesthetics of the community." The Court had no difficulty concluding that these limitations "directly advanced" the community's aesthetic interests:

> There can be little doubt that the limitations on the number of "for sale" signs per property found in the ordinances of Matteson, Park Forest, Country Club Hills and University Park advance concerns for proper physical appearance. *A proliferation of signs in a residential community certainly detracts from the beauty of that community.* Likewise, the restrictions on the size of signs found in the ordinances of Matteson, Park Forst and Country Club Hills facilitate aesthetic

concerns. *A large sign is a greater intrusion on a residential neighborhood's appearance than is a smaller sign.*

Id. at 897 (emphasis added).

* *Long Island Bd. of Realtors v. Incorporated Village of Massapequa Park*, 277 F.3d 622 (2d Cir. 2002), where the Court upheld a municipal ordinance that limited signs in residential districts to 15 inches by 15 inches, and further said that no parcel could display more than one sign (other than identification or professional signs) and that the signs must be located with three feet of the dwelling or building line. In finding these restrictions to be constitutional, the Court explained that:

> the regulations in Chapter 286 are not more extensive than necessary to serve the Village's interest in aesthetics and safety. Municipalities and other government bodies have "considerable leeway...in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech." *South-Suburban*, 935 F.2d at 896....Where a legislature's ends are aesthetics and safety, permissible means have included the regulation of size, placement, and number of signs, *see South-Suburban*, 935 F.2d at 897, as well as the prohibition of off-site commercial advertising. *See Metromedia*, 453 U.S. at 508-11....Thus, the restrictions on the number, size, and location of signs...further the Village's interest in aesthetics and safety....We therefore find a reasonable fit between the Village's ends and the means it has chosen to accomplish those ends.

Id. at 627-28.

* *Sugarman v. Village of Chester*, 192 F.Supp.2d 282 (S.D.N.Y.,2002), which upheld a municipal ordinance limiting temporary political signs to four square feet in size and requiring a permit for any permanent sign that is larger than two square feet in size. The Court explained that:

> we find the size limitation to be a reasonable restriction furthering Greenwood Lake's interests in aesthetics, property values and safety that does not unduly restrict political speech. *See Baldwin*, 540 F.2d at 1369 (holding that size limitation on political signs was constitutional and that it "contribute[s] to the appearance of the community and further[s] other legitimate municipal interests").

Id. at 295.

These cases make it clear that governments can regulate the size and placement of signs on residential property, so long as they do not prohibit such signs altogether. Courts tend to defer to the decisions made by local legislative bodies, which are most familiar with the specific conditions of each community, with regard to the specific provisions governing the size and

location of the signs.

In its testimony before the House Committee on Water, Land, Ocean Resources and Hawaiian Affairs last year, the State Attorney General recommended adding a new section in section 2 of the bill that would state:

> provided that "valuable consideration" shall not include any benefit derived by the tenant or owner of the property from the effect of the advertising.

The Outdoor Circle does not believe that this addition would be appropriate, because it might encourage residents to engage in advertising at their residential property for businesses and other commercial activities that they own or operate or are affiliated with elsewhere, thus violating Hawaii's prohibitions on off-site advertising.

The State Attorney General also suggested in its earlier testimony that the language in section 445- (c) referring to "four or more units" be deleted to "avoid an Equal Protection constitutional challenge by tenants and owners of multi-unit structures with fewer than four units." The language in the proviso to section (c) was added in recognition of county ordinances that do allow multi-unit structures with four or more units to have some common identification signage. Because it is a "time/place/manner" regulation governing an area that would not be viewed as a public forum, courts would typically examine this regulation to evaluate whether it is content-neutral and is reasonable in light of its purposes. This provision would appear to be constitutional under this test, because it does not favor one viewpoint over another and does serve the logical goal of permitting identification signage for multi-unit structures large enough to warrant such signage. The Outdoor Circle does not therefore think that it is necessary to delete the language referring to "four or more units."

Because the language in this Bill would become a new section in Chapter 445, it would be anticipated that the penalties listed in Section 445-121 would apply to violations.

Hawaii has restricted outdoor advertising for many decades, in order to protect and preserve the dramatic visual scenery found throughout our state and also to limit distractions that might interfere with traffic safety. Protecting our scenic beauty is important for the health and enjoyment of our local residents and is also essential to our economic health, because our scenery is a primary draw for the visitors who come for vacations to the islands. The unregulated proliferation of signs in residential and agricultural areas has become a visual blight that requires regulation. Bill 1832 is a balanced measure that permits expressive signs in residential and agricultural areas, but provides appropriate regulation so that this signage does not interfere with the beauty of our islands.

testimony

From: Casey [casey@hawaiinaturecenter.org]
Sent: Friday, March 07, 2008 2:59 PM
To: testimony
Subject: HB1832

Senate Judiciary Committee Tuesday March 11, 2008 9:30 AM Testimony supporting HB1832

Thank you for the opportunity to testify in strong support of HB1832.

HB1832 eliminates large campaign banners and sets a sensible maximum square footage for campaign signs on any one property. These minor restrictions will prevent the eyesores created each election year in many neighborhoods‹especially at strategically located properties where multiple campaign signs are plastered on fences. These are small steps that will make a big difference in preventing parts of our islands from being overrun with campaign signs.

HB1832 keeps a level playing field for all candidates and allows the public to voice their support for the candidates of their choice in a manner that respects and protects the visual environment of our state.

HB1832 passed on a nearly unanimous vote in the 2007 HawaiŒi House of Representatives. Now it¹s time for the full Senate to have an opportunity to be heard. But for that to happen the bill must be passed out of this committee.

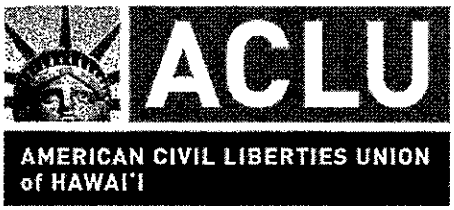
In the end, we urge you to look at this bill the way your constituents look at itŠ.as a means of allowing everyone to voice support for the candidates of their choice, while protecting the ambiance of our communities and our most precious natural resource‹the beauty of HawaiŒi.

We strongly urge you to do the right thing for HawaiŒi by voting in favor of HB1832.

Mahalo.

Casey Carmichael
Kailua, Oahu

LATE



BY EMAIL:	**testimony@capitol.hawaii.gov**
Committee:	Committee on Judiciary and Labor
Hearing Date/Time:	Tuesday, March 11, 2008, 9:30 a.m.
Place:	Room 016
Re:	*Testimony of the ACLU of Hawaii, Offering Comments on HB 1832, HD1, Relating to Outdoor Advertising*

Dear Chair Taniguchi and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes to offer comments to HB 1832, HD1.

The ACLU of Hawaii does not oppose the Legislature's efforts to impose reasonable time, place, and manner restrictions on outdoor advertising to preserve Hawaii's natural beauty. Nevertheless, we have serious concerns about this bill because it sets different limits for those living in multi-unit condominiums and those living in other types of residences.

Under the language of HB 1832 HD 1, in some circumstances, condominium owners/tenants could be much worse off than owners/tenants of single family homes: the overall square-footage limit does not have any relationship to the size of the condominium, such that a four-unit condominium and a fifty-unit condominium are allowed the same square footage of signage. This would seemingly create a "first-in-time" rule – whoever first displays signs gets to keep the signs in place, while everyone else in the condominium is shut out. Although the bill allows for each resident to display signs, this requirement could cause problems in the following hypothetical scenarios:

- In a highly contested presidential primary, one candidate's supporters arrive early and place signs totaling 64 square feet on the property. The other candidate's supporters are unable to place any signs on the property at all without convincing the other (potentially through legal action) to remove some of her or his signs.

- A presidential caucus takes place in February, and supporters of a presidential candidate place signs totaling 64 square feet on the property in advance of the caucus. Those signs remain in place through the general election in November. Meanwhile, candidates for other offices – State Legislature, Board of Education, and so on – are unable to place any signs on the property at all (and have the delicate task of asking a presidential candidate to remove some of her or his signs).

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

Certainly, condominium associations could regulate some of this behavior; nevertheless, the condominium boards may be influenced by the types of signs displayed by individual residents (*i.e.*, whether the condominium board happened to support or oppose the particular candidate whose signs were dominating the property), and this bill seems to invite disputes between tenants.

In other circumstances, condominium owners/tenants would be *better* off than their counterparts in single family homes. Condominium owners/tenants are able to display eight-foot by four-foot signs – quadruple the size allowed for an owner/tenant of a single family home – thus giving them greater visibility to passers-by. There is no indication as to why a condominium owner/tenant should be entitled to a bigger sign than that of single family home owner/tenant.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F:808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

LATE

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8000 • FAX: (808) 527-6743
INTERNET: www.honolulu.gov • DEPT. WEB SITE: www.honoluludpp.org

MUFI HANNEMANN
MAYOR

HENRY ENG, FAICP
DIRECTOR

DAVID K. TANOUE
DEPUTY DIRECTOR

March 11, 2008

The Honorable Brian T. Taniguchi, Chair
and Members of the Committee on Judiciary and Labor
Senate
State Capital
Honolulu, Hawaii 96813

Dear Chair Taniguchi and Members:

Subject: House Bill 1832, HD1
Relating to Outdoor Advertising

The Department of Planning and Permitting **reiterates its opposition** to House Bill 1832, HD1, which establishes standards for signs on residential "properties."

The City and County of Honolulu has longstanding, comprehensive and locally appropriate sign regulations enumerated in Article 7 of the Land Use Ordinance (LUO). Pursuant to these sign regulations, individual dwelling and/or lodging units have no entitlement to signage other than a temporary real estate sign, which is a maximum of four (4) to eight (8)-square-feet.

By specifying standards (number and size) for signs on residential and agricultural properties, House Bill 1832, HD1 creates the perception that individual dwelling units have a legal entitlement to erect a sign (commercial or otherwise) on the property. Since current LUO provisions are more restrictive than that proposed in House Bill 1832, HD1, this regulation is unnecessary. Allowing individual dwelling units (or creating such misconception) to have signs will inappropriately increase sign clutter within our communities, which is contrary to the expressed intent of this legislation.

We do not support these sign standards, and will not recommend them for inclusion within our own sign regulations. As long as the Courts continue to demonstrate a strong preference in favor of unregulated free speech with respect to political signage, we will refrain from regulation of political signs.

Thank you for the opportunity to present our views.

Please file House Bill 1832, HD1.

Very truly yours,

Henry Eng, FAICP, Director
Department of Planning and Permitting

HE:jmf
hb1832hd1-jh.doc